



UNITED STATES SENATE
**REPUBLICAN
POLICY COMMITTEE**

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The Democrat Judiciary Committee

**Breaking the Rules Instead of
Addressing the Failures**

“Now this is wrong. It is wrong to treat a senior Senator like this. It is wrong to treat a distinguished Federal district court judge like this. It is wrong to break the rules. It is wrong to break them with impunity. And I think it is wrong to treat the President’s nominees this way.”

– Senator Hatch, *Congressional Record*, S10163, October 9, 2002

Last week, Judiciary Committee Chairman Leahy, in violation of the rules of the Judiciary Committee and contrary to his pledge to Senator Thurmond, removed the nomination of Judge Dennis Shedd to the Fourth Circuit from the committee’s agenda. The committee rules allow an agenda item to be delayed once – and the Shedd nomination already had been delayed, in September. After an agenda item has been delayed, it can only be held over for one week or until the next business meeting, whichever occurs later.

Judge Shedd, considered an outstanding district judge since his confirmation in 1990, received a “well qualified” rating from the American Bar Association (referred to by the aforementioned chairman as the “gold standard”). He has wide bipartisan support, including that of his home state’s Democrat Senator, Fritz Hollings. In spite of all of this, Senator Leahy acquiesced to liberal special interest groups in avoiding a vote on the nomination, breaking both the committee rule and his promise to several Senators.

Excusing the Inexcusable

Senator Reid offered this defense of the Judiciary Committee chairman on the Senate Floor:

“The Judiciary Committee has continued to receive opposition from South Carolina and from African American and other civil rights organizations and leaders from around the country to the Shedd nomination. . . . During the last 15 months, the Judiciary Committee has held hearings on over 100 judicial nominees, voted on 100 and reported 98. The Senate has confirmed 80 to date with 18 more on the calendar, as we speak. That is more

hearings for more nominees and more votes on nominees and more confirmations of more nominees than in the last 30 months in which Republicans controlled the Senate. The Judiciary Committee is doing a good job of helping reduce the judicial vacancies it inherited from the Republicans when they delayed and obstructed President Clinton's nominees. I understand Senator Thurmond's disappointment, but he has to understand Senator Leahy is doing an outstanding job. And I and the rest of the Democrat conference totally support this good man, the Senator from Vermont" [*Congressional Record*, S10162-10163, 10/9/02].

Democrats who excuse Senator Leahy's breaching of the committee rules do so on the basis of the "achievements" of the Judiciary Committee – breaking the rules is acceptable if you have done a good job so far. They fail to mention that the Chairman could have prevented the confirmation of Judge Shedd in the same way he blocked Judges Pickering and Owen. Senator Leahy could have allowed a committee vote, defeating the nomination with a majority of 'no' votes. Apparently, Senator Leahy knew he did not have the votes to defeat Judge Shedd, so he had to circumvent the committee's rules.

Examining the Record

Majority Leader Daschle, in response to questions about Chairman Leahy's actions, said of the Judiciary Committee: "I defy anyone to come up with a better record" [Associated Press, 10/8/02]. The Majority Leader's challenge is easily met. Comparing the first two years of President George W. Bush with the first two years of Presidents Clinton, George H.W. Bush, and Reagan, one can see that this Senate is woefully below the standard for judicial confirmations.

Due to stalling by the Leahy-led Judiciary Committee of the 107th Congress, President Bush has seen only 61 percent of his nominations confirmed, including a mere 43 percent of his nominations to the Circuit Court. However, President Clinton, during his first two years in office, saw 90 percent of his nominations confirmed, including 86 percent of those to the Circuit Court. President George H.W. Bush's nominations received a 93-percent confirmation rate during the 101st Congress, with 96 percent of his Circuit Court nominations getting the nod. The best record was during President Reagan's first two years, when the 97th Congress confirmed 98 percent of his judicial nominations, including 95 percent of his Circuit Court nominees and 100 percent of his District Court nominees.

One argument Democrats repeatedly employ to trumpet their confirmation "successes" is a red herring: they say that this Democrat-led Senate has seen "more judges confirmed in 15 months than were confirmed during the first 15 months of the Reagan, G.H.W. Bush, and Clinton Administrations" (Democrat Policy Committee publications, 9/27/02 and 10/11/02). This argument is nonsense in that it compares unlike items – Democrats want to measure their 15 months in the majority (starting in June, 2001) against the first 15 months of each of the last three administrations (starting in January). The failure of this comparison is that new administrations do not send large lists of nominations immediately upon inauguration; generally, there is a lag between the beginning of a new administration and the

Senate's receipt of the lists of judicial nominations. For example: President Reagan did not submit his first list of judicial nominations until July 1981, six months into his first term; President G.H.W. Bush sent two nominations on February 28, 1989, but did not send any more nominations until August 1989; and President Clinton did not forward his first nominations for judgeships on the federal courts for eight months. However, when the Democrats assumed the majority June 6, 2001, President Bush had already submitted 18 nominations for the federal courts, meaning the Leahy Judiciary Committee had a running start. Rather than use this advantage to effectively address vacancies in the judiciary, the Leahy Judiciary Committee has stumbled along because of Democrat partisanship.

Not Too Late

Democrats still have a chance to improve their record and right a wrong. Republican Leader Lott today attempted to help the process along by asking for unanimous consent that the Shedd nomination be discharged from the committee and voted on by the full Senate prior to the adjournment of the 107th Congress, but Senator Daschle objected. The Majority Leader may keep the Senate in session for another week or two and perhaps return after the elections. That should be plenty of time to address at least a few of the 18 judicial nominations pending on the Executive Calendar, and to permit Senator Leahy to live up to his promise and put the Shedd nomination to a vote. The nominations of Judges McConnell and Estrada, too, could receive action by the committee and the Senate before the end of the year.

The Senate may still address the needs of the judiciary before the 107th Congress comes to a close, if only the Democrats will permit it. But considering Senator Leahy's willingness to break the rules to block a vote on a nomination, hopes are not high that he would actually break the Democrat-imposed logjam on needed jurists.

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